COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Berkshire Gas Company 2002 Service Quality	)	**D.T.E. 03-11**

ATTORNEY GENERAL'S MOTION FOR RECONSIDERATION

The Attorney General, pursuant to 220 C.M.R. § 1.11(10), moves the Department of Telecommunications and Energy for reconsideration of its Order issued on September 30, 2003, in the Berkshire Gas Company ("Berkshire" or the "Company") service quality docket. The Attorney General asks the Department to reconsider its decision not to hold evidentiary hearings in this matter and its decision that the Company's 2002 Service Quality Report ("SQ Report") complies with the service quality guidelines ("SQ Guidelines") established in G.L. c. 164, § 1E. As grounds for this motion, the Attorney General states:

1. On March 13, 2003, the Department of Telecommunications and Energy ("Department") opened an investigation into the SQ Report filed by Berkshire. The Department docketed the matter as D.T.E. 03-11 and issued an Order of Notice requesting Comments on the Company's proposed SQ Report.

2. On March 26, 2003, the Attorney General submitted Comments in this docket, asking the Department to conduct an evidentiary hearing to permit a more detailed review and examination of the Company's SQ Report and allow meaningful discovery and cross-examination. *See* AG Comments, p. 2; *see also* G.L. c. 30A, § 11(3); *Attorney General v. Department of Public Utilities*, 392 Mass 262, 270 (1984)(Supreme Judicial Court determination that "the arguments made by the Attorney General during a proceeding in which he is entitled to intervene by statute, see G.L. c. 12, § 11E, may not be ignored by the department.").

3. On March 27, 2003, and August 4, 2003, the Attorney General issued his first and second sets of discovery in this docket. The Company's responses to these information and data requests raised a number of concerns regarding Berkshire's compliance with the staffing level requirements of the SQ Guidelines established in G.L. c. 164, § 1E.

4. G.L. c. 164, § 1E(b) provides in relevant part:

> "In complying with the service quality standards and employee benchmarks established pursuant to this section, a distribution, transmission or gas company that makes a performance based rate filing after the effective date of this act shall not be allowed to engage in labor displacement or reductions below staffing levels in existence on November 1, 1997, unless such are part of a collective bargaining agreement or agreements between such company and

> the applicable organization or organizations representing such organizations, or with the approval of the department following an evidentiary hearing at which the burden shall be upon the company to demonstrate that such staffing reductions shall not adversely disrupt service quality standards as established by the department herein."

5. Berkshire has reduced staffing levels by 15 employees (including 8 union positions) since November of 1997. *See* AG-2-1. The Company claims that its staffing level reductions are consistent with the terms of relevant collective bargaining agreements.[1] *See* AG-2-6, AG-2-7, AG-2-8. Nothing in the record indicates that there is a collective bargaining agreement that permits a reduction in staffing below the 1997 levels. To the contrary, the record contradicts that claim. *See* Attachment 1 (correspondence to the Department raising concerns about the current staffing levels and disputing the existence of a collective bargaining agreement permitting reductions in staffing below 1997 levels); Attachment 2 (Affidavit of Michael E. Ferriter refuting the Company's claim that the current reduced staffing level is authorized under any collective bargaining agreements).

6. Staffing levels below 1997 levels are permissible **only** if authorized by a collective bargaining agreement **or** approved by the Department **following an evidentiary hearing**. G.L. c. 164, § 1E (emphasis added). Since there is a dispute of material fact regarding whether the current reduced staffing level is authorized under any collective bargaining agreements,[2] the reduced staffing level cannot be deemed to be authorized or in compliance with the staffing level requirements in the SQ Guidelines in G.L. c. 164, § 1E. Similarly, because the reduced staffing level has not been approved by the Department in connection with an evidentiary hearing, it likewise cannot be deemed to be authorized or in compliance with the staffing level requirements in the SQ Guidelines in G.L. c. 164, § 1E.

7. The Department's Order, while not specifically addressing staffing levels, provides that the Company's SQ Report is in compliance with the SQ Guidelines and thus encompasses the staffing level issue. This decision conflicts with the provisions of G.L. c. 164, § 1E, since the record is devoid of a collective bargaining agreement allowing the staffing reductions and there have been no evidentiary hearings prior to the approval of such reductions.

8. The Department may grant reconsideration of previously decided issues when

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[1] The only documentation the Company provides to support this claim is inapposite, pertaining the Company's authority to layoff workers, not to permanently reduce staffing below the 1997 levels. *See* AG-2-7. The Company seemingly misinterprets any authority it may have to layoff workers as being tantamount to authority and approval in the collective bargaining agreement for permanent reductions in staffing. *See* Attachment 2 (Affidavit of Michael E. Ferriter disputing this interpretation).

[2] This dispute of a material fact should be afforded an evidentiary hearing to allowing meaningful discovery and cross-examination.

extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. *North Attleboro Gas Company*, D.P.U. 94-130-B, p. 2 (1995); *Boston Edison Company*, D.P.U. 90-270-A, pp. 2-3 (1991). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. *Massachusetts Electric Company*, D.P.U. 90-261-B, at 7 (1991); *New England Telephone and Telegraph Company*, D.P.U. 86-33-J, at 2 (1989); *Boston Edison Company*, D.P.U. 1350-A, at 5 (1983).

9. An evidentiary hearing in this docket is required to resolve the dispute regarding whether the Company's current reduced staffing level is authorized under any collective bargaining agreements. Alternatively, in the absence of a staffing level determination based upon the terms of a collective bargaining agreement, an evidentiary hearing is required by law prior to the approval of any staffing levels below those in existence in 1997.

WHEREFORE, the Attorney General requests that the Department grant this Motion and hold an evidentiary hearing regarding Berkshire's compliance with the staffing level requirements of the SQ Guidelines established in G.L. c. 164, § 1E.

Respectfully submitted,

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